

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 32

COMPREHENSIVE CARE OF OAKLAND LP,
dba BAY AREA HEALTHCARE CENTER,

Employer,

and

CAYETANO SANCHEZ,

Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL UNION—
UNITED HEALTHCARE WORKERS-WEST (SEIU-UHW),

Union.

Case 32-RD-134177

**BAY AREA HEALTHCARE CENTER'S OPPOSITION
TO UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
SUPPLEMENTAL DECISION ON OBJECTIONS**

Pursuant to Section 102.67(f) of the NLRB's Rules and Regulations, Bay Area Healthcare Center (the "Company") submits this brief in opposition to SEIU-UHW's (the "Union") Request for Review of the Regional Director's Supplemental Decision on Objections. The Union's request should be summarily denied because the Regional Director properly employed his discretion in scheduling the election and because his decision was reasonable. There is no reason for the Board to overturn the Regional Director's well-reasoned and thorough decision based on the Union's baseless and purely procedural claim.

The Union bases its request for review exclusively on a provision of the NLRB Casehandling Manual (“Manual”)—Section 11734—that suggests that regional directors to obtain written waivers from a charging party if an election is scheduled during the notice-posting period of an active NLRB case. The Union asserts that, due to this provision, the Regional Director had no authority to schedule the election in this case during the notice-posting period in cases 32-CA-134708 and 32-CA-135626 absent a waiver from the Union.¹ According to the Union, this departure from “officially reported Board precedent” is sufficient to warrant Board review. The Union is mistaken.

ARGUMENT

A. The Regional Director Is Not Required To Follow The Provisions Of The Manual, Which Is Discretionary In Nature.

The Board and courts are in accord that the Manual’s provisions do not constitute “officially reported Board precedent,” but rather guidelines, or “suggestions,” that are “discretionary in nature.” *Perdue Farms, Inc. v. NLRB*, 927 F. Supp. 897, 902–03 (E.D.N.C. 1996) (the Board “cannot be ordered to fulfill the [M]anual’s suggestions to the letter”); *see also Gulf States Mfrs., Inc. v. NLRB*, 598 F.2d 896, 908 n.8 (5th Cir. 1979) (the Manual “is designed only to provide procedural and operational guidance for the agency staff”); *NLRB v. Birdsall Constr. Co.*, 487 F.2d 288, 291–92 (5th Cir. 1973) (the Manual is not a rule or regulation, “but rather a set of procedural guidelines”); *Mobilab Union, Inc. v. Johansen*, 600 F. Supp. 826, 830 (D.N.J. 1985) (the Manual is an “advisory statement” as opposed to a “statement of mandatory procedures”).

¹ In these cases, the Employer settled blocking charges filed by the Union concerning “house rules” that the Union itself agreed to during negotiations. Though the Employer had never sought to enforce the rules, it agreed to rescind or revise the rules at issue. It did so no later than December 2, 2014, and notified employees in writing on December 10, 2014 of the new rules. These new rules and the NLRB notice were posted in every break room for 70 days before the election was conducted on February 18, 2015.

The NLRB itself has noted the “well established” notion that the provisions of the Manual “are guidelines and not binding rules.” *Embassy Suites Hotel, Inc.*, 313 N.L.R.B. 302 (1993); *see also Corr. Health Care Solutions*, 303 N.L.R.B. 835 (1991). Indeed, the preamble to the Manual states under “Purpose of the Manual” that the Manual is not binding and Regional Directors are expected to exercise their professional judgment and discretion:

The Manual is **not a form of binding authority**, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board...Although it is expected that the Agency’s Regional Directors and their staffs will follow the Manual’s guidelines in the handling of cases, it is also expected that **in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules.** Rather, they provide a framework for the application of the Board’s decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act. (emphasis added)

Given the clear purpose of the Manual, in this instance the Regional Director did have the authority to schedule the election during the notice-posting period without obtaining a waiver from the Union, contrary to the argument of the Union.

B. Determinations By Regional Directors Should Be Given Deference By The Board.

Additionally, there is a consensus that determinations of regional directors should be given deference, particularly with respect to Board-made electioneering rules, where the regional directors have significant expertise in judging whether the election atmosphere is fair, neutral, and impartial. *See NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 68 (3d Cir. 1983). There is no reason to question or undo a regional director’s decision where the alleged violations are merely procedural and do not compromise the election’s validity. *See, e.g., LC Cassidy & Son, Inc. v. NLRB*, 745 F.2d 1059, 1063 (7th Cir. 1984); *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 958 (8th Cir. 1984). “The test is not whether optimal practices were followed, but whether on all the facts the

manner in which the election was held raises a reasonable doubt as to its validity.” *Nabisco*, 738 F.2d at 958. Indeed, elections should only be set aside when a Board “agent, by failing to follow established procedures for conducting elections, *compromises the election’s neutrality*.” *Id.* (emphasis added).

In *LC Cassidy*, the petitioner attempted to rely on a specific statement in the Manual requiring union observers to wear identification badges during an election to invalidate the election, but the court was not persuaded, noting that the Manual “recognizes that there may be departures from the procedures outlined therein in varying circumstances.” *LC Cassidy*, 745 F.2d at 1063. The court also acknowledged the regional director’s discretion in reaching his conclusion that no prejudice resulted, and that the regional director’s decision was “supported by substantial evidence.” *Id.*

Similarly, in *Nabisco*, the petitioner asserted that an election ought to be set aside because certain union observers failed to wear their identification badges as required by the Manual. *Nabisco*, 738 F.2d at 958. The petitioner argued that there is a *per se* rule of invalidation for any deviation from procedure, no matter how slight. *Id.* The court disagreed, noting that the petitioner’s argument was “a mistaken view of the law,” and that the test should be whether the procedural irregularity compromises the integrity of the election or raises a reasonable doubt as to its validity. *Id.* There was no such question as far as the court was concerned, so it held that the regional director had not abused his discretion in overruling the petitioner’s objection. *Id.*

Here, the Union has not shown that the “procedural irregularity” in question—scheduling an election during the notice-posting period without obtaining a waiver from the Union—compromises the integrity of the election, or that there is a reasonable doubt as to its validity. Moreover, the Regional Director set forth a comprehensive, well-reasoned response to the

Union's objection, setting forth specific reasons why the election was not compromised by his scheduling it during the notice-posting period, and identifying cases supporting his decision. *See Supplemental Decision on Objections and Notice of Hearing* (Apr. 30, 2015) at 4–9.

The Regional Director's analysis is correct – the Union had agreed to the house rules at issue during negotiations and the Employer never sought to enforce them. Upon receipt of the blocking charges, the Employer agreed to settle and rescind the offending rules. It notified all employees of that fact, and posted the new rules and the required NLRB notice for 70 days prior to the election. As the Regional Director correctly determined, “the Employer did not maintain House Rules that could have reasonably affected employee free choice in the February 18 election,” particularly since the Union lost the election by a substantial margin.

The Regional Director also noted that the Union had “failed to present any evidence to support [its] assertion.” *Id.* at 7. The same is true of the Union's request for review here. The Union is trying to seize upon a procedural technicality in the Manual, which the Regional Director has the discretion to not follow under appropriate circumstances, to overturn an election that it lost by a substantial margin. The Regional Director's decision should thus be given deference and upheld.

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CONCLUSION

The Regional Director had the authority to schedule the election in this case during the notice-posting period in cases 32-CA-134708 and 32-CA-135626 absent a waiver from the Union, and properly exercised his discretion in doing so. His decision should be upheld and the request for review filed by the Union denied.

Dated: May 21, 2015

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On May 21, 2015, I served the following documents in the manner described below:

**BAY AREA HEALTHCARE CENTER'S OPPOSITION TO UNION'S REQUEST
FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON
OBJECTIONS**

<input checked="" type="checkbox"/>	(BY U.S. MAIL) I am personally and readily familiar with the business practice of Polsinelli LLP for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
<input checked="" type="checkbox"/>	BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Polsinelli LLP's electronic mail system from mgehrke@polsinelli.com to the email addresses set forth below.

On the following part(ies) in this action:

Yosef Peretz Peretz & Associates 22 Battery Street, Suite 200 San Francisco, CA 94111 Email: yperetz@peretzlaw.com Via Email and Mail Delivery	Bruce A. Harland Manuel A. Boigues Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501 Email: bharland@unioncounsel.net mboigues@unioncounsel.net Via Email and Mail Delivery
Cayetano Sanchez 249 Laurel Avenue Hayward, CA 94541 Via Mail Delivery	Regional Director National Labor Relations Board, Region 32 1301 Clay Street, Suite 300N Oakland, CA 94612-5211 Via E-File and Mail Delivery

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 21, 2015, at San Francisco, California.


Rosemary Jones-Shine